Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1996

RAUL ARCHULETA,
Petitioner,

vs.

CITY OF FARMINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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QUESTION PRESENTED FOR REVIEW

Whether federal law prohibiting double jeopardy bars a subsequent criminal prosecution when defendant has already been punished by driver's license revocation from the same conduct?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals is unreported and appears in the appendix to this Petition for a Writ of Certiorari at Pet. App. A2 through A3. The order of the Supreme Court of New Mexico is unreported and appears at Pet. App. A1.

JURISDICTION

The order of the Supreme Court of New Mexico was issued on June 20, 1996 denying certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1251.

STATUTES AND REGULATIONS

§66-8-102	New Mexico DUI statute
§19-30(b)	City of Farmington ordinance on failure submit to breath test
§66-8-112	New Mexico License Revocation statute
§66-8-107	New Mexico Implied Consent Act

STATEMENT OF THE CASE

On June 5, 1993, Plaintiff was arrested and charged with the offense of Driving Under the Influence of Intoxicating Liquors or Drugs (DUI), and criminal refusal to submit to a breath test. Plaintiff was also given a notice of revocation of his driver's license by the officer, which informed Plaintiff that unless a New Mexico motor vehicle department (MVD) hearing was requested within ten (10) days of the arrest, the MVD would automatically revoke Plaintiff's license for failure to submit to a breath test. Mr. Archuleta requested an MVD hearing, at which his driver's license revocation was sustained by the hearing officer. As a result of the administrative hearing, Plaintiff has fully served a one-year revocation period of his driver's license for refusal to take the breath test in the investigation of his DUI. In a separate proceeding, Plaintiff went to trial on the DUI criminal charge arising out of the same facts (the prosecutor filed a nolle prosequi on the criminal charges of refusal to submit to a breath test), was found guilty, and sentenced to ninety days in the San Juan County Detention Center with eighty-seven days suspended upon completion of DWI school. Upon motion after the conviction, the court refused to dismiss the criminal charges under the double jeopardy clause because of the prior MVD punishment. Plaintiff subsequently appealed first to the New Mexico Court of Appeals, then to the New Mexico Supreme Court, both of which denied the appeal summarily based on existing New Mexico case law.

REASONS FOR GRANTING THE WRIT

The plaintiff had a revocation of his driving privileges by the MVD prior to adjudication and sentencing in this criminal case. Plaintiff claims this is double jeopardy contrary to federal law.

Double Jeopardy Clauses

Amendment IV, U.S. Constitution provides:

> . . . nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb . . .

Art. II, sec. 15, New Mexico Constitution:

> . . . nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affidavit upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.

Federal Case Law

"Double jeopardy" stands for the legal proposition that prohibits citizens from being prosecuted and punished for the same offense in two or more separate proceedings. That protection applies with equal force regardless of whether the first prosecution results in a conviction or an acquittal. See, Burks v. United States, 437 U.S. 1 (1978); Brown v. Ohio, 432 U.S. 161 (1971).

> [A] civil sanction that cannot fairly be said **solely** to serve a remedial purpose, but rather can only be explained as **also** serving either a **retributive** or **deterrent** purposes is **punishment**, as we have come to understand the term. United States v. Halper, 490 U.S. 335, 488 (1989) [emphasis added].

United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994), *citing* Austin v. United States, 113 S.Ct. 2801, 2806, 2812 (1993). Thus, the proper analysis of whether or not double jeopardy attaches turns of this court determining whether a penalty is **punitive** and therefore **punishment**, or the penalty is simply **remedial** and not **punishment**.

Civil action can bar criminal action, as in United States v. McCaslin 836 F.Supp. 1299 (W.D. Wash., 1994); Dept. of Revenue of Montana v. Kurth Ranch, 119 S.Ct.1937 (1994).

The Court in Kurth Ranch identified six features to the Montana statute which compelled the conclusion that the tax on an illegal drug sale was "punishment." They are:

1. The tax had a deterrent or punitive purpose and not solely remedial.

2. The tax was conditioned on the commission of a crime.

3. The tax was enacted after a person was arrested for the precise conduct that gave rise to the tax obligation in the first place.

4. Person arrested for possession of marijuana constituted the entire class of those persons subject to the tax.

5. The tax was imposed by the same sovereign which exacted the criminal sanction.

6. The tax was not imposed at the same proceeding as the criminal sanction.

Compare: United States v. Usery, 1996 W.L. 340815 (US). (In rem civil forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy clause).

Current Status of New Mexico Law on Double Jeopardy

In State, ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995), the New Mexico Supreme Court found:

> We conclude that - despite its deterrent effect -- revocation of a person's driver's license based on the conduct of either failing to take a chemical test or refusing to take a chemical test under the circumstance

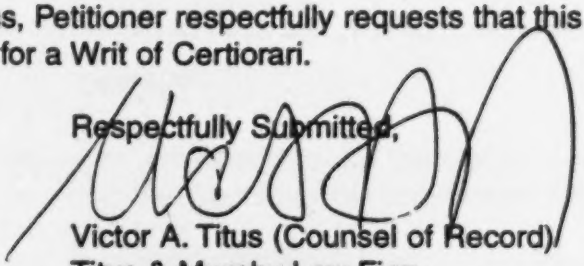
stated in Section 66-8-107 is consistent with the government's goals in implementing the Implied Consent Act and is therefore remedial, not punitive, for the purposes of the Double Jeopardy Clause.

We hold that administrative driver's license revocation under the Implied Consent Act does not constitute "punishment" for the purposes of the Double Jeopardy Clause.

CONCLUSION

For all the above reasons, Petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of New Mexico was mailed to the United States Supreme Court, 1 First Street, Washington, DC 20543; to the Honorable Joseph L. Rich, 201 S. Hill Street, Gallup, New Mexico, 87301; Court Monitor to Judge Rich, 201 S. Hill Street, Gallup, New Mexico, 87125; and John Lewis, Attorney for City of Farmington, 800 Municipal Drive, Farmington, New Mexico 87401, this 13th day of September, 1996.

VICTOR A. TITUS

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, June 20, 1996

No, 23, 668
CITY OF FARMINGTON,
Plaintiff-Respondent,

vs.

RAUL ARCHULETA,
Defendant-Petitioner.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is denied In Court of Appeals number 17225.

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /S/
Chief Deputy

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
CITY OF FARMINGTON,

Plaintiff-Appellee,

vs.

No. 17,225
San Juan County
CR 93-426-2

RAUL ARCHULETA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
JOSEPH L. RICH, District Judge

JOHN H. LEWIS
Assistant City Attorney
Farmington, New Mexico — Attorney for Plaintiff-Appellee

VICTOR A. TITUS
TITUS & MURPHY
Farmington, New Mexico — Attorneys for Defendant-Appellant

MEMORANDUM OPINION

Bustamante, Judge.

Defendant appeals from the denial of his post-conviction double jeopardy motion to dismiss. Our calendar notice proposed summary affirmance, and Defendant filed a memorandum in opposition. We affirm.

Defendant's argument in opposition to our proposed affirmance of his issue on appeal is made pursuant to State v. Franklin, 78 N.M.127, 129, 428 P.2d 982, 984 (1967), and State v. Boyer, 103 N.M. 655, 658-60, 712 P.2d 1, 4-6 (Ct. App. 1985). We have considered the arguments Defendant has made in his docketing statement and memorandum in opposition. These

arguments do not persuade us that affirmance is not the correct disposition. See also State v. Mondragon, 107 N.M. 421, 423, 759 P.2d 1003, 1005 (Ct. App.), cert. denied, 107 N.M. 267, 755 P.2d 605 (1988).

We affirm.

IT IS SO ORDERED.

/ s /
MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

/ s /
LYNN PICKARD, Judge

/ s /
BENNY E. FLORES, Judge